Appendix I

(a) "Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) "Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) "Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction." (28 U.S.C. § 1441)

Appendix II

In the United States District Court for the Northern District of California, Northern Division

Civil No. 8672

William F. Scanlan,
Plaintiff,

vs.

Anheuser-Busch, Inc., a corporation; John Flanigan; George Elliott; George Newhouse; George Liokos; Richard O'Shanesy; Doe I; Doe II; Doe III; First Corporation, a corporation; and Second Corporation, a corporation,
Defendants.

MEMORANDUM AND ORDER

Presently before this Court is a motion filed by plaintiff to have this action remanded back to the Superior Court of the State of California, in and for the County of San Joaquin. In the alternative, plaintiff has moved (1) for a preliminary injunction, and (2) for leave to file a supplement to his complaint. By stipulation, however, decision on each of those motions has been stayed, pending determination of plaintiff's present motion to have this case remanded. The latter motions will not presently be considered.

Defendant Anheuser-Busch removed this action from the Superior Court of the State of California, in and for the County of San Joaquin, on June 12, 1963, the complaint having been filed in said Superior Court on June 3, 1963. The original complaint set forth three counts, alleging, respectively, causes of action for violation of federal and state anti-trust laws through refusal to deal (Count I), for breach of an oral contract of distributorship (Count II),

and for wrongful solicitation of plaintiff's customers (Count III). The only defendant named in Counts I and II was defendant Anheuser-Busch. Each of the individual named defendants was included within the allegations contained in Count III.

By the allegations of the petition for removal, plaintiff is a citizen and resident of the State of California, and defendant Anheuser-Busch is a Missouri corporation, with its principal place of business in St. Louis, Missouri. As to Counts I and II, therefore, it appears that there is complete diversity of citizenship between the parties (Title 28 U.S.C. § 1332), and that this is a proper basis for removal under the provisions of Title 28 U.S.C. § 1441(a).

In addition, however, included within the allegations of Count I, and repleaded by reference in Counts II and III, is language pertaining to the Federal Alcohol Administration Act (Title 27 U.S.C. § 201), and the Sherman and Clayton Anti-Trust Acts (Title 15 U.S.C. § 1 *et seq.*). It is contended by defendant Anheuser-Busch that reference to these statutes, and their presumed basis as support for plaintiff's alleged causes of action, constitutes sufficient ground to establish federal question jurisdiction in this Court (Title 28 U.S.C. §§ 1331 and 1441(b)). Such a contention is without merit, since removal jurisdiction is derivative. It is essential, upon removal, that the state court from which removal was effected have had jurisdiction over the case. If it did not, the district court cannot acquire derivative jurisdiction by reason of removal, even though there might have been original federal jurisdiction of the action if it had been filed in the district court in the first instance (*Venner v. Michigan Cent. R.R.*, 271 U.S. 127). In the instant case, both plaintiff and defendant Anheuser-Busch agree that the Superior Court in San Joaquin County could have had no jurisdiction of a federal anti-trust action under

either the Sherman Act (See: Title 15 U.S.C. § 4, and *Hand v. Kansas City Southern Ry. Co.*, 55 F.2d 712) or the Clayton Act (See: Title 15 U.S.C. § 9), or of an action under the Federal Alcohol Administration Act (See: Title 27 U.S.C. § 207, and *Strauss v. Berkshire*, 132 F.2d 530). In the absence of such state court jurisdiction under any of those statutes, said statutes cannot be used as a basis for removal of this action to this court, under the *Venner* rule (See, also, *A. J. Curtis & Co. v. D. W. Falls, Inc.*, 305 F.2d 811). Jurisdiction of this Court over the instant case must rest, if it exists at all, upon the diversity of citizenship between plaintiff and defendant Anheuser-Busch.

It appears that each of the named individual defendaants, against whom a cause of action is alleged in Count III, is a citizen and resident of the State of California. As to that count, therefore, diversity of citizenship is defeated. The crux of the instant motion thus comes down to the question of whether the provisions of Title 28 U.S.C. § 1441(c) are applicable to the instant case. That section provides as follows:

> "Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one of more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction."

This Court is thus concerned with the question of whether plaintiff's alleged cause of action in Count III, relating to the wrongful solicitation of customers, is a "separate and independent claim or cause of action."

The present test of "separate and independent claim or cause of action" was set forth in 1948, was considered by the United States Supreme Court in *American Fire & Cas-*

ualty Co. v. Finn, 341 U.S. 6, and was interpreted by that Court to involve a more restrictive basis for removal than the former test, "separable controversy." The Supreme Court held that,

> "where there is a single wrong to plaintiff, for which relief is sought, arising from an interlocked series of transactions, there is no separate and independent claim or cause of action under § 1441(c)."

In determining what constitutes a "separate and independent claim or cause of action," the governing rule appears to be that federal law supplies the test as to what is a separate and independent claim, but state law may be looked to in determining what the nature of the claims are to which the test is to be applied (See: *Charles Dowd Box Co. v. Fireman's Fund Ins. Co.,* 303 F.2d 57; *Smith v. Southern Pacific Co.,* 187 F.2d 397; *White v. Baltic Conveyor Co.,* 209 F. Supp. 716; *Anderson v. Union Pac. R. Co.,* 200 F.Supp. 465; *Garroutte v. General Motors Corp.,* 179 F.Supp. 315; and *Shaver v. Arkansas-Best Freight System, Inc.,* 171 F.Supp. 754; but cf. *Kolb v. Prudential Ins. Co.,* 170 F.Supp. 97).

Plaintiff has placed great reliance upon Judge Carter's decision in *Guess v. Kellog Switchboard & Supply Company,* 143 F.Supp. 807. The *Guess* case involved allegations that the plaintiff had been wrongfully suspended as an employee by the corporate defendant, and that the individual defendants had wrongfully induced the corporation to take such action. The holding was to the effect that the individual defendants were properly joined, and that the plaintiff was making complaint of only one wrong, namely, his suspension from employment. Both the *Guess* case and the instant case involve a question of action plus a question of inducement to action. In *Guess,* however, the wrongful

act involved a suspension, and the inducement involved that particular wrongful act. In the instant case, however, the alleged wrongful act involves the breach of the distributorship agreement, whereas the inducement is not directed toward that breach, but rather is directed toward a solicitation of customers. These involve completely separate and distinct "wrongs," under California substantive law (*Buxbom v. Smith,* 23 Cal.2d 535). As such, they fulfill the "separate and independent claim or cause of action" test of § 1441(c) (See, also, *Allison v. American Airlines,* 112 F.Supp. 37).

Parenthetically, it might well be noted that the case of *Mayflower Industries v. Thor Corp.,* 184 F.2d 537, appears to indicate a contrary holding. That case, however, was decided prior to the construction of § 1441(c) in *American Fire & Casualty Co. v. Finn, supra,* and involved allegations of a conspiracy between the defendants which would connect the two separate causes of action. In the opinion of this Court, however, the reasoning of Judge McLaughlin, in dissent, indicates the proper construction of § 1441(c).

IT IS, THEREFORE, ORDERED that plaintiff's motion to remand the instant case to the Superior Court of the State of California, in and for the County of San Joaquin, be, and the same is, hereby denied. This case will be re-set on the motion of either party for consideration of plaintiff's motions for leave to amend his complaint and for a preliminary injunction.

Dated: August 9, 1963.

SHERRILL HALBERT

United States District Judge